No. 75-661

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

GABRIEL FRANCIS ANTELOPE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 523 F.2d 400.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on September 4, 1975. On September 28, 1975, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including November 3, 1975. The petition was filed on that day and was granted on February 23, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in legislating with regard to criminal offenses committed in Indian country, Congress may,

consistent with requirements of equal protection of the law, assert federal jurisdiction only with respect to offenses in which an Indian is involved either as accused or as victim, leaving to the States the prosecution of offenses entirely involving non-Indians (under laws that may differ from and in some particulars be more or less lenient than federal law).

2. Whether, if the preceding question is answered in the negative, 18 U.S.C. 1152 should be construed literally to encompass all offenses in Indian country, without distinction based upon the identity of the persons involved, thereby eliminating the possibility of disparate treatment arising from the status of the accused.

STATUTES INVOLVED

18 U.S.C. 1151 provides:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. 1152 provides:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

18 U.S.C. 1153 provides:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> As used in this section, the offenses of rape and assault with intent to commit rape shall be defined in accordance with the laws of the State in which the offense was committed, and any Indian who commits the offenses of rape or

assault with intent to commit rape upon any female Indian within the Indian country shall be imprisoned at the discretion of the court.

As used in this section, the offenses of burglary, assault with a dangerous weapon, assault resulting in serious bodily injury, and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed.

18 U.S.C. 1111 provides in pertinent part:

(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

* * * * *

Idaho Code § 18–4001 (1948) provides:

Murder defined.—Murder is the unlawful killing of a human being with malice aforethought.

Idaho Code § 18–4003 (1975 Cum. Supp.) provides:

Degrees of murder.—All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate and premeditated killing is murder of the first degree. Any murder of any peace officer of this state or of any municipal corpo-

ration or political subdivision thereof, when the officer is acting in line of duty, and is known or should be known by the perpetrator of the murder to be an officer so acting, shall be murder in the first degree. Any murder committed by a person under a sentence for murder of the first or second degree shall be murder in the first degree. All other kinds of murder are of the second degree. [As added by 1972, ch. 336, § 1, p. 844; amended 1973, ch. 276, § 1, p. 588.]

Idaho Code § 18–4004 (1975 Cum. Supp.) provides:

Punishment for murder.—Every person guilty of murder in the first degree shall suffer death. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison not less than ten (10) years and the imprisonment may extend to life. [As added by 1972, ch. 336, § 1, p. 844; amended 1973, ch. 276, § 2, p. 588.]

STATEMENT

1. In February 1974, four persons broke into Emma Johnson's house, which was within the boundaries of the Coeur d'Alene Indian Reservation in Idaho (within "Indian country" as defined by 18 U.S.C. 1151), robbed her, and killed her by kicking and beating her to death (Pet. App. 1a–3a; see also A. 6–9). Because the crimes involved Indians (here, the accused; Mrs. Johnson was not an Indian) and occurred in Indian country, and because they were offenses specifically enumerated in 18 U.S.C. 1153, the crimes came within the jurisdiction of the federal district court.

A federal grand jury returned an indictment against the respondents—Gabriel Antelope, Leonard Davison, and William Davison—and co-defendant Norbert Sey-

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ler. Count I of the indictment charged that Leonard Davison and Gabriel Antelope, enrolled Coeur d'Alene Indians, feloniously entered the house of Emma Johnson, a non-Indian, with the purpose to commit robbery. Count II charged that they forcibly took from her a purse of money belonging to her. Count III charged that they, with William Davison and Norbert Seyler, also enrolled Coeur d'Alene Indians, "with malice aforethought and in the perpetration of the robbery alleged in Count Two hereof, unlawfully and willfully did kill Emma Teresa Johnson * * * by beating [her] * * * with their fists and feet" (A. 4–5).

The respondents pleaded not guilty. After a jury trial in the United States District Court for the District of Idaho, respondents Antelope and Leonard Davison were convicted on all three counts, including first degree murder under Count III. Respondent William Davison was convicted solely of second degree murder under Count III (Pet. App. 2a–3a).[1]

Although the evidence appears to have been sufficient to have submitted to the jury a charge of premeditated murder (see A. 6–9), respondents were indicted and tried on a felony murder theory, per-

[1] After pre-sentence investigations, Antelope was sentenced to 15 years' imprisonment on each of Counts I and II and to life imprisonment on Count III, the sentences to run consecutively. Leonard Davison was sentenced to the custody of the Attorney General under the Youth Corrections Act (18 U.S.C. 5010) for concurrent terms of 15 years on each of Counts I and II and for life on Count III. William Davison was sentenced to the custody of the Attorney General under the Youth Corrections Act for 12 years (A. 13–18). Seyler was granted immunity and testified at trial for the government. A portion of his testimony is set out at A. 6–9.

mitted by the applicable federal statutes (18 U.S.C. 1153 and 1111). Under the federal felony murder principle reflected in 18 U.S.C. 1111, a killing with malice aforethought, which would otherwise constitute second degree murder, will support a conviction for first degree murder if the killing is perpetrated during the commission of one of a specified list of felonies (here robbery). Thus, the jury was not required to find premeditation in order to convict respondents of first degree murder (see Instruction No. 34, A. 11).

2. The court of appeals reversed the convictions of murder. It noted that because the victim was a non-Indian, the accused, had they too been non-Indians, would not have been tried in federal court under federal law but would instead have been tried and punished under Idaho law (Pet. App. 4a). Under Idaho law, a defendant may be convicted of first degree murder only upon proof of premeditation and deliberation concerning the murder (Idaho Code § 18–4003 (1975 Cum. Supp.)).[2] As noted above, under federal law applicable to this case no showing of premeditation was required to convert respondent's killing of Mrs. Johnson with malice aforethought in the course of a robbery from second degree murder to first degree murder.

The court of appeals concluded that "the *sole* basis for the disparate treatment of appellants and non-Indians is that of race" (Pet. App. 6a; emphasis in original). It stated that the defendants, by being tried under federal law rather than state law, were "put at

[2] In which event there is a mandatory death sentence, Idaho Code § 18–4004 (1975 Cum. Supp.), pp. 4–5, *supra*.

a serious racially-based disadvantage" (*id.* at 14a) that could not be justified under the government's wardship over Indians and that accordingly the conviction violated the equal protection concept implicit in the Due Process Clause of the Fifth Amendment. The court thus held the murder provision of 18 U.S.C. 1153 unconstitutional as applied in this case. The court cautioned that it was not holding the felony murder provision of 18 U.S.C. 1111 unconstitutional (Pet. App. 15a), but that "Indians' rights to due process and equal protection under the Fifth Amendment require that they not be treated worse than similarly situated non-Indians" (*id.* at 14a).[3]

SUMMARY OF ARGUMENT

I.

The court of appeals has erroneously characterized the respondents' convictions of first degree murder as impermissible racial discrimination. The respondents were convicted under 18 U.S.C. 1111, the federal enclave murder statute, which is applicable to all persons charged with homicide within federal criminal jurisdiction, regardless of race or status. The possibil-

[3] Since respondent William Davison was convicted only of second degree murder, the elements of which appear to be identical under federal and Idaho law (both 18 U.S.C. 1111 and Idaho Code §§ 18–4001, 18–4003, define second degree murder as "the unlawful killing of a human being with malice aforethought"), no reason appears in the decision of the court of appeals for reversing his conviction. Nevertheless, this apparent oversight on the part of the court of appeals presents no question of broad importance for this Court, and our petition as to this respondent was confined to the common grounds raised as to all three respondents.

ity of different treatment when non-Indians commit crimes against other non-Indians in Indian country exists only because such crimes are outside the reach of existing federal criminal statutes. *New York ex rel. Ray* v. *Martin,* 326 U.S. 496; *Draper* v. *United States,* 164 U.S. 240; *United States* v. *McBratney,* 104 U.S. 621. Thus, this case does not present the question whether Congress may constitutionally provide that Indians may be convicted of felony-murder but similarly situated non-Indians may not. Rather the question is whether Congress may, without violating equal protection concepts, assert exclusive jurisdiction over crimes within Indian country involving Indians as perpetrators or victims, while leaving to the States, under laws that will inevitably differ in some respects from federal law, the trial of crimes within Indian country in which no Indians are involved.

A. This division of responsibility between state and federal jurisdiction is constitutionally valid. It has been continually recognized by decisions of this Court. It is a rational allocation of jurisdiction, providing federal jurisdiction where there is a federal trust responsibility and state jurisdiction where no federal or Indian interest is involved. Because of the substantial non-Indian population within Indian reservations, the division serves a particularly useful function today.

If the division of jurisdiction is valid, it follows that Congress need not define crimes within its sphere of jurisdiction in a fashion conforming to the definitions in the various States in which reservations are located. Yet the decision of the court of appeals creates the anomaly that although Congress may elect to

legislate as to crimes involving Indians either as perpetrators or victims, leaving other crimes on the reservation to state jurisdiction, its law is not supreme, but must conform to, or at least be no less lenient than, state law. But Congress, having authority to legislate on a matter, need not extend its legislation to its Constitutional limits, nor need it conform its scheme of regulation to state regulation. Decisions of this Court as to legislation concerning interstate commerce and other analogous subjects make this clear. Moreover, nothing in the decisions relied upon by the court of appeals requires the comparison with state law improperly mandated by the court of appeals; those decisions were addressed to the need for even-handed application of federal power to defendants tried in federal court, and it is undisputed that the trial of any person in federal court for a murder committed in Indian Country is governed by uniform federal law.

B. Respondents' convictions do not rest upon an impermissible racial classification. To begin with, their convictions were obtained under a statute applicable to any homicide within federal criminal jurisdiction, regardless of the race of the defendant. Moreover, as this Court has noted, the regulation of Indian affairs by the federal government does not derive from race but from the former independence of the Indian tribes and their conquest by the United States, which then assumed a special trust responsibility for them. Providing for federal and tribal jurisdiction over criminal matters where Indians' interests are at issue (but not where they are not) is an important exercise of

this trust responsibility. It is not a racial discrimination. Persons racially Indian but having no connection with a tribe under trust responsibility are unaffected by such statutes.

C. The principle adopted by the court of appeals leads to confusion or impossibility in the enforcement of criminal law in Indian country. The decision appears to require a comparison of state and federal law to see which is more lenient, with federal law inapplicable in whole or part whenever state law is more lenient. Heretofore clear federal laws, applicable throughout federal jurisdiction, have governed the trial of homicides and other serious crimes within federal Indian country jurisdiction. In comparing these laws with state laws, it is often impossible to determine which is more lenient. For instance, here, Idaho law does not provide for felony murder but does provide a mandatory death penalty. It is not obvious that the court of appeals was correct in characterizing the state law as more "lenient." Nor is it accurate to equate "leniency" with the "Indian interest." Finally, if such comparisons are required, state prosecutions of non-Indians for crimes committed against other non-Indians within Indian reservations are also cast in doubt when the federal law is more lenient. The substantial adverse impact of the court of appeals' decision on prospects for rational and effective law enforcement in Indian country serves, we submit, to illuminate the rationality of the historic allocation of state and federal jurisdiction heretofore sanctioned by this Court.

As a practical matter, if the analysis of the court of appeals is correct, Congress would be forced either to assert exclusive federal jurisdiction over all offenses occurring in Indian country, thereby increasing federal responsibility beyond the needs of its trusteeship, or to provide that all offenses be governed by state law under an assimilative crime principle, thereby being forced to renounce the supremacy of federal law in a field of federal responsibility. It is far from obvious that either development would lead to more equitable or more rational law enforcement in Indian country.

II.

On its face, 18 U.S.C. 1152 requires the application of general federal enclave law to all offenses committed in Indian-country, even those entirely between non-Indians. In *McBratney* and other cases this Court interpreted Congress' intent in enacting predecessors of 18 U.S.C. 1152 as not extending federal jurisdiction to crimes between non-Indians. If that interpretation leads to unconstitutional results because of the division of jurisdiction, the Court should reconsider its decisions in *McBratney* and its progeny. We do not consider such an extension of federal jurisdiction to be necessarily desirable, but it could be preferable to the uncertainties caused by the impact of the decision of the court of appeals upon the present regime of divided state-federal jurisdiction.

ARGUMENT

I.

RESPONDENTS WERE NOT DENIED EQUAL PROTECTION OF THE LAWS

The proper starting point for evaluation of any claimed deprivation of equal protection of the laws is a correct identification of the "discrimination" that has allegedly taken place. It is in that respect that we have perhaps our most fundamental disagreement with the analysis of the court of appeals. In essence, according to the court, this case involves a discriminatory definition of the offense of first degree murder based solely on the race of the defendant (Pet. App. 6a–7a). While the court recognized that the discrimination it had identified arose from the lack of federal court jurisdiction over the offenses with which respondents' offenses were being compared (*id.* at 11a), it stated that "[t]he government should not be permitted to accomplish through discriminatory jurisdiction what it cannot do through discriminatory statutory coverage when both Indian and non-Indian defendants are jurisdictionally covered" (*id* at 12a).

The court of appeals' use of the active voice in describing the "discrimination" involved in the instant case creates, we submit, an inaccurate impression of the relevant statutory provisions at issue. The statute under which respondents were convicted of murder in the first degree, 18 U.S.C. 1111, applies to all persons charged with homicide in the special maritime and territorial jurisdiction of the United States (which, by operation of Sections 1152 and 1153, includes Indian country), regardless of race, national

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origin, political status, or any other characteristic. In other words, any person who commits murder in the course of a robbery taking place on a military base or a vessel of the United States on the high seas—whether Indian or non-Indian—is equally liable to conviction for murder in the first degree. The same is true in the case of the killing of an Indian in Indian country.

In short, nothing anywhere in the United States Code affirmatively provides for different treatment of Indians and non-Indians charged with murder. The possibility of differential treatment arises only because, out of the entire universe of murderers potentially subject to federal court jurisdiction and to the application of substantive federal law by virtue of the geographical location of their offense, one group—non-Indians who commit crimes against other non-Indians in Indian country—is outside the reach of the present federal statutes governing crimes committed in Indian country. *New York ex rel. Ray* v. *Martin,* 326 U.S. 496; *Draper* v. *United States,* 164 U.S. 240; *United States* v. *McBratney,* 104 U.S. 621. This limited withholding of federal jurisdiction is, as we show within, eminently sensible. Moreover, the statutory framework as so construed remains entirely neutral on its face. No different standards are prescribed, either more severe or more lenient, for non-Indians committing offenses against other non-Indians in Indian country; the matter is simply left for disposition by the courts of the State in which the offense occurred, in accordance with the law of that State governing like crimes committed (by Indians as well as non-Indians) elsewhere in the State.

Thus, this case does not present the question whether Congress may constitutionally provide that Indians may be convicted of felony-murder but similarly situated non-Indians may not. Rather, the question presented is whether Congress may, without violating equal protection concepts, assert exclusive federal jurisdiction over crimes committed in Indian country involving an Indian as perpetrator or victim while leaving to the States, under procedural and substantive rules that will inevitably differ in at least some respects from those established by Congress for federal cases, the trial of crimes in which no Indian is involved.[4] We argue below that this selective and facially neutral exercise of federal jurisdiction is constitutionally proper and is in accordance with principles long recognized by this Court, that it does not amount to an impermissible racial classification, and that its abandonment would seriously impede prospects for rational law enforcement in Indian country.

[4] This case thus differs significantly from *United States* v. *Cleveland,* 503 F. 2d 1067 (C.A. 9), on which the court below relied (Pet. App. 9a–12a). See discussion at pp. 31–32, *infra.*

A. THE EXISTING ALLOCATION OF FEDERAL AND STATE JURISDICTION OVER OFFENSES COMMITTED IN INDIAN COUNTRY, PREVIOUSLY APPROVED BY THIS COURT, IS CONSTITUTIONALLY VALID

18 U.S.C. 1152 and its statutory predecessors[5] appear on their face to make federal law applicable to all crimes committed by non-Indians within Indian country,[6] while reserving to tribal jurisdiction some crimes committed by Indians. The Major Crimes Act (18 U.S.C. 1153), in turn, provides federal jurisdiction over 13 major crimes when committed by Indians in Indian country, including the crime of murder as defined by 18 U.S.C. 1111,[7] thus providing full federal and tribal jurisdiction over crimes within Indian

[5] 18 U.S.C. 1152 stems from the Act of June 30, 1834, 4 Stat. 733, as amended by the Act of March 27, 1854, 10 Stat. 269, 270, which was incorporated in the Revised Statutes as Sections 2145 and 2146. Section 2145, in language substantially identical to 18 U.S.C. 1152, provided that "[e]xcept as to crimes the punishment of which is expressly provided for in this Title, the general laws of the United States as to punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."

The second paragraph of 18 U.S.C. 1152 (R.S. 2146) provides that the section "shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribes * * *."

[6] "Indian country" is defined in 18 U.S.C. 1151, see p. 2, *supra*.

[7] Other crimes committed by Indians are left to tribal jurisdiction (see *Keeble* v. *United States*, 412 U.S. 205, 209–212), except for crimes not dependent on the territorial jurisdiction of the United States (see *Head* v. *Hunter*, 141 F.2d 449 (C.A. 10); *Walks on Top* v. *United States*, 372 F.2d 422 (C.A. 9), certiorari denied, 389 U.S. 879), and certain victimless crimes that are punished under federal misdemeanor laws if not previously punished by the tribe. See 18 U.S.C. 1152, para. 2.

country. But over the course of years, this Court has read these statutes as not encompassing crimes by non-Indians against non-Indians, even though such offenses occur within Indian country. *United States* v. *McBratney,* 104 U.S. 621; *Draper* v. *United States,* 164 U.S. 240; *New York ex rel. Ray* v. *Martin,* 326 U.S. 496. See *Williams* v. *Lee,* 358 U.S. 217, 219–220; *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164, 170–171.

What has thus emerged is a coherent overall structure, under which full recognition is given to the paramount federal and tribal responsibility for regulation when Indians or Indian interests are involved, while the jurisdiction of the State may be recognized over events occurring within its borders and not implicating Indian interests, even though the events may take place in Indian country. It is this division of jurisdiction that, according to the holding of the court of appeals in the instant case, has created a constitutionally impermissible discrimination. We begin, therefore, with a brief review of the evolution by this Court of the principles here found by the court of appeals to be unconstitutional in their application.

1. "From almost the beginning, the existence of federal power to regulate and protect the Indians and their property against interference even by a state has been recognized." *Board of Commissioners* v. *Seber,* 318 U.S. 705, 715. The origin and nature of this power were described by the Court in *Seber* as follows (318 U.S. at 715):

> This power is not expressly granted in so many words by the Constitution, except with respect

> to regulating commerce with the Indian tribes, but its existence cannot be doubted. In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic.

See also *Morton* v. *Mancari,* 417 U.S. 535, 551.

Since the seminal decision in *Worcester* v. *Georgia,* 6 Pet. 515,[8] the Court has repeatedly nullified state laws affecting Indians that either conflicted with "governing Acts of Congress" or "infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams* v. *Lee,* 358 U.S. 217, 220; *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145, 148. It has by similar token upheld federal laws implementing Congress' wardship responsibility against claims of encroachment on state sovereignty. See, *e.g., United*

[8] In *Worcester* v. *Georgia*, the Court through Chief Justice Marshall, invalidated Georgia's prosecution of a non-Indian for living on an Indian reservation without a license from the State. The Court concluded (6 Pet. at 560):

"The Cherokee nation * * * is a distinct community, occupying its own territory, * * * in which the laws of Georgia can have no force, * * * but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States."

States v. *Kagama,* 118 U.S. 375; *Donnelly* v. *United States,* 228 U.S. 243; *United States* v. *McGowan,* 302 U.S. 535; *United States* v. *Mazurie,* 419 U.S. 544.

But while this Court has consistently recognized the plenary power of Congress over Indian affairs, it has also been careful to point out that this power does not of itself divest the States of jurisdiction over events occurring in Indian country within their borders. In *Surplus Trading Company* v. *Cook,* 281 U.S. 647, 651, the Court stated the governing rule to be that the Indian reservations "are part of the State within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards." More particularly, in *Williams* v. *Lee, supra,* 358 U.S. at 219–220, the Court reviewed cases in which it had "modified" the principle of exclusive federal jurisdiction over Indian country to permit state jurisdiction where "essential tribal relations were not involved." Recently, in *McClanahan* v. *Arizona State Tax Commission, supra,* 411 U.S. at 170–171, the Court noted that "the Indian sovereignty doctrine, with its concomitant jurisdictional limit on the reach of state law, has [not] remained static during the 141 years since *Worcester* was decided;" rather, "notions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians."

2. The general balance between state and federal power that has evolved, permitting state jurisdiction within Indian country whenever Indian interests are

not at stake, holds true in the case of criminal offenses as well as in civil matters. Indeed, the principles expounded in *Williams* and *McClanahan* derived in large part[9] from this Court's decisions in *United States* v. *McBratney,* 104 U.S. 621, *Draper* v. *United States,* 164 U.S. 240, and their progeny, which established the allocation of jurisdiction over criminal offenses that the court of appeals concluded in the instant case created an unconstitutional discrimination.

Both *McBratney* and *Draper* involved attempts by the federal government to prosecute a non-Indian for the murder of another non-Indian in Indian country. Jurisdiction for the prosecution in federal court was invoked under R.S. 2145, which (like its modern successor, 18 U.S.C. 1152) appeared to authorize federal jurisdiction over all crimes occurring on Indian reservations, apart from those crimes reserved to tribal jurisdiction. The defendants contended, however, that federal jurisdiction should not be found because the original form of R.S. 2145 (Act of June 30, 1834, see note 5, *supra*) did not concern Indian country within the confines of any State, but rather those areas west of the Mississippi River within the territories of the United States. A law designed for federal territories should not, it was argued, be automatically applied in the same fashion to Indian country within the boundaries of a State.

Rather than simply construing the language of R.S. 2145, therefore, the Court began its consideration with

[9] See *Williams*, *supra*, 358 U.S. at 219–220; *McClanahan*, *supra*, 411 U.S. at 171.

the treaties governing relations between the federal government and the respective tribes prior to statehood, together with the enabling legislation providing for admission of the States (Colorado and Montana, respectively) into the Union. The treaties had contained no provision for the punishment of offenses wholly involving non-Indians (*McBratney, supra,* 104 U.S. at 622, 624, *Draper, supra,* 164 U.S. at 243). Thus, the Court framed the issue as whether the enabling acts manifested a Congressional purpose to reserve federal jurisdiction over Indian land, including crimes entirely between non-Indians, "thereby divesting the State *pro tanto* of equal authority and jurisdiction over its citizens, usually enjoyed by the other States of the Union" (*Draper, supra,* 164 U.S. at 242).

In *McBratney,* the Court found nothing in the Colorado enabling act (Act of March 3, 1875, 18 Stat. 474) denying the State jurisdiction over crimes between non-Indians committed on an Indian reservation (104 U.S. at 623); it held that, as Congress had not affirmatively asserted jurisdiction over such crimes, that jurisdiction was reserved to the State by virtue of its admission into the Union upon an equal footing with the original States.[9a]

[9a] The Court has subsequently refused to construe *McBratney* as holding that R.S. 2145 was repealed in its entirety as States were admitted into the Union, thereby divesting the federal government of jurisdiction even over crimes by or against Indians on the reservation within the State's borders, unless express language in the enabling act or governing treaty reserved each jurisdiction. In *Donnelly* v. *United States*, *supra*, 228 U.S. at 271, the Court noted that in *McBratney* and *Draper* "the question was reserved as to the effect of the admission of the State into the Union upon the Federal jurisdiction over crimes committed by or against the Indians themselves," and the *Donnelly* Court held that "[u]pon full consideration we are satisfied that offenses committed by or

The Montana enabling act at issue in *Draper* (Act of February 22, 1889, 25 Stat. 676) differed from that in *McBratney* in providing that the people of Montana "forever disclaim all right * * * to [Indian Lands] * * * and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States * * *" (164 U.S. at 244). The Court interpreted this language as manifesting Congress' intent to negate any "implication" that the newly-passed allotment acts would subject "the Indians themselves * * * [to] the authority and control of the State" (*id.* at 246) but not any intent to preclude state jurisdiction over criminal acts between non-Indians occurring on Indian lands or reservations. The Court concluded (*id.* at 247; emphasis supplied):

> It follows that a proper appreciation of the legislation as to Indians existing at the time of the passage of the enabling act by which the State of Montana was admitted into the Union * * * demonstrates that in reserving to the United States jurisdiction and control over Indian lands *it was not intended to deprive that State of power to punish for crimes committed on a reservation or Indian lands by other than Indians or against Indians.*

It is likely that the allotment acts were one factor disposing the Court to reaffirm the holding of *McBratney* despite the stronger disclaimer of the Montana enabling act. The General Allotment Act of 1887, 24 Stat. 388, had been designed in part to "open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." *Seymour* v. *Superintendent,* 368 U.S. 351, 356; *Mattz* v. *Arnett,* 412 U.S. 481, 496–497. The resulting settlement of increasing numbers of non-Indians on the reservations provided additional justification (both in terms of the State's interest in uniformly applying its laws to all its citizens and in terms of the growing burden on federal law enforcement agencies on the reservation) for permitting the States to exercise jurisdiction over crimes on the reservation that did not directly affect Indians. That justification, we would add, has lost none of its force with the passage of time. Today it is common to find that the majority of persons residing within an Indian reservation are non-Indians. For example, the Department of Interior estimates that some 450 enrolled Indians and some 2,500 non-Indians live on the Coeur d'Alene Reservation, where the respondents murdered Mrs. Johnson.[10]

against Indians are not within the principle of the *McBratney* and *Draper* Cases." See also *United States v. Kagama*, 118 U.S. 375. The Coeur d'Alene reservation, like that in *Donnelly*, was created by executive order. Executive Order of June 14, 1867, modified by Executive Order of November 8, 1873 (Kappler, *Indian Affairs, Laws and Treaties*, vol. 1, 835–837).

[10] While some reservations have a predominantly Indian population, *e.g.*, Navajo Reservation: Indian population 54,515, non-Indian 6,866 (89% Indian); Red Lake Reservation: Indian population 2,538; non-Indian 212 (92% Indian), many reservations have a non-Indian majority, *e.g.*, Flathead Reservation; Indian population 2,663, non-Indian 12,831 (17% Indian); Wind River Reservation: Indian population 3,511, non-Indian 11,938 (23% Indian) (see *United States* v. *Mazurie*, *supra*). Figures supplied by the Department of Interior based on 1970 census.

The Court has subsequently reinforced the *McBratney* and *Draper* holdings. In *New York ex rel. Ray* v. *Martin, supra,* involving a murder between non-Indians on a reservation in New York, an original State, the Court noted that *McBratney* "has since been followed by this Court and its holding has not been modified by any act of Congress" (326 U.S. at 498). The Court held that "in the absence of a limiting treaty obligation or Congressional enactment *each* state [has] a right to exercise [criminal] jurisdiction over Indian reservations within its boundaries" (*id.* at 499; emphasis added). Moreover, replying to the argument that R.S. 2145 (now 18 U.S.C. 1152) manifested an assertion of federal jurisdiction even over non-Indian offenses in Indian country, the Court stated: "* * * the *McBratney* line of decisions stands for the proposition that States, by virtue of their statehood, have jurisdiction over such crimes notwithstanding § 2145." *Id.* at 500; see also *Williams* v. *Lee, supra,* 358 U.S. at 220.

In sum, it is the involvement of an Indian as victim or perpetrator—that is, a direct federal guardianship interest—that activates federal jurisdiction over crimes in Indian country. The division of jurisdiction thus created respects the competing interest of federal and state sovereignty and has the additional advantage of reducing the burden on federal courts and federal law enforcement agencies in a sizeable number of cases in which Indian interests are affected either marginally or not at all. While we do not doubt Congress' authority to bring the entire population of an Indian reservation under federal criminal jurisdiction, if it finds this necessary for the protection of its Indian wards,[11] the decision not to assert jurisdiction over crimes between non-Indians is a reasonable one.

Accordingly, while the *McBratney* line of cases has been criticized by some commentators as reflecting a misreading of the original intent of Congress,[12] it also reflects a long-standing, rational, and judicially approved division of jurisdiction between the federal government, in the exercise of its role as guardian of Indian tribes, and the States, in the exercise of their "legitimate interests in regulating the affairs of non-Indians" (*McClanahan* v. *Arizona State Tax Commission, supra,* 411 U.S. at 170–171).

3. It is clear from the foregoing that to the extent respondents were tried under different laws from those that would have governed the trial of a hypothetical non-Indian murdering another non-Indian, it is solely because their acts were within federal jurisdiction, whereas, had there been no Indian involvement, the offense would have been exclusively within state jurisdiction. There is, as pointed out at pp. 13–14, *supra,* no basis for a claim that anyone committing acts within federal jurisdiction, whether Indian or non-Indian, would have been treated in any different fashion from respondents.

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[11] See *e.g.*, *United States* v. *Mazurie*, 419 U.S. 544, 553–556; see also the discussion at pp. 42–45, *infra.*

[12] See Davis, *Criminal Jurisdiction over Indian Country in Arizona*, 1 Ariz. L. Rev. 62, 70 (1959); Canby, *Civil Jurisdiction and the Indian Reservation*, 1973 Utah L. Rev. 206, 208. As we have shown, however, because the original predecessor of 18 U.S.C. 1152 was an act applicable to territories, not States, there may have been no misreading.

Inherent in this or any other division of jurisdiction is the likelihood that the controlling substantive and procedural law will vary in some particulars between the two systems, since they are enacted by different sovereigns as parts of different regulatory structures. But if it be accepted that the line between state and federal jurisdiction over crimes in Indian country may lawfully be drawn based upon whether an Indian was in any way involved, then, we submit, it follows that Congress need not define crimes (here the crime of murder) within its sphere of jurisdiction in a fashion conforming to the definition of similar crimes by the various States within which reservations may be located.

The decision of the court of appeals, however, would seem to require just that result. True, the court does not purport to challenge the plenary authority of Congress over Indian affairs, nor, of course, to question the command that the laws and treaties made by Congress under the Constitution "shall be the supreme Law of the Land" (Art. VI, cl. 2). Yet its decision creates the anomaly that although Congress may elect to legislate as to crimes involving Indians either as perpetrator or victim, leaving other crimes on the reservation to state jurisdiction, its legislation in this regard is not supreme but must conform to, or at least must be no less lenient than, the equivalent state legislation.

The court of appeals attempts to justify this anomalous result by stating (Pet. App. 12a) that "[t]he government should not be permitted to accomplish through discriminatory jurisdiction what it cannot do through discriminatory statutory coverage when both

Indian and non-Indian defendants are jurisdictionally covered." But this Court has repeatedly upheld a jurisdictional division based on whether an Indian interest is at stake and more specifically, in criminal law, on whether an Indian is either victim or perpetrator. There is plainly a rational basis for this allocation of jurisdiction, and we submit that it follows that any incidental differences in treatment that result from this valid division of jurisdiction are constitutionally permissible.

The soundness of this view is reinforced by reference to other areas in which the Constitution confers upon Congress powers comparable to those it enjoys with respect to Indian affairs. Whenever Congress has plenary power over a subject (e.g., interstate commerce), with the concomitant responsibility to determine how far to exercise that power, it can always be shown that assertion of federal power to a particular extent permits a disparity in federal-state treatment of like cases that could have been avoided by a more restricted or a more sweeping assertion of federal jurisdiction. But so long as the line is drawn rationally, as this Court has consistently considered this line to have been drawn, the resultant disparities afford no ground for a claim of denial of equal protection.

With respect to the Commerce Clause, for example, this Court has noted that "[i]t is of the essence of the plenary power conferred that Congress may exercise its discretion in the use of the power" (*Currin* v. *Wallace*, 306 U.S. 1, 14) and "may choose, as it has chosen frequently in the past, to regulate only part of what it

constitutionally can regulate, leaving to the States activities which, if isolated, are only local" (*Kirschbaum* v. *Walling,* 316 U.S. 517, 521). If "the legislators * * * have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce" (*Katzenbach* v. *McClung,* 379 U.S. 294, 304), the courts do not question the legislative judgment that a particular activity falls within or outside of the federally-regulated class.

The federal gambling statute, 18 U.S.C. 1955, affords an example. Congress found that illegal gambling as an aspect of organized crime affects interstate commerce, but it subjected to federal jurisdiction only those operations that, in addition to violating state law, are conducted by five or more persons and either operate for more than thirty days or have a gross revenue in excess of $2,000 in any single day; the rest it left to state regulation. While Congress could have concluded that gambling operations of whatever magnitude, when viewed together, affect commerce and therefore require federal regulation, and while, conversely, some operations that fall within the federal statute may as a practical matter have no more effect on commerce than operations that Congress has left to state regulation, the courts have consistently held that in defining the federal offense as it did Congress acted reasonably. See, *e.g., Schneider* v. *United States,* 459 F.2d 540, 541–543 (C.A. 8), certiorari denied, 409 U.S. 877; *United States* v. *Sacco,* 491 F.2d 995, 999–1001 (C.A. 9).[13]

[13] In *Perez* v. *United States*, 402 U.S. 146, this Court rejected the argument that Congress' power over commerce did not authorize it to make federal the historically local crime of loan sharking. The Court concluded that Congress had a rational basis for outlawing as a class "extortionate credit transactions," including small-time operations whose effect on commerce, viewed in isolation, was not likely to exceed that of numerous crimes traditionally left to state regulation. The Court emphasized that it is not the function of the courts "to excise, as trivial, individual instances" of the class of activities that Congress has chosen to regulate (*id.* at 154). The Court thus reaffirmed the principle that, subject only to the requirement of reasonableness, it is for Congress to exercise its plenary power over commerce to the extent it sees fit, taking into account both its responsibilities and the traditional functions of the States.

In yet another area this Court has affirmed the principle that Congress is not required to exercise fully a plenary power given it by the Constitution. In *Palmore* v. *United States*, 411 U.S. 389, the Court rejected a claim that Congress could not constitutionally create a separate court system for the District of Columbia, consisting of judges who did not enjoy the tenure and salary protections of Article III judges, to hear cases arising under local law. The Court pointed out that, while Article III empowered Congress to create a system of lower federal courts, it did not require it to do so, "[n]or, if inferior federal courts were created, was it required to invest them with all the jurisdiction it was authorized to bestow under Art. III" (411 U.S. at 401). On the contrary, the Court continued, both Congress and the Court had recognized "that the requirements of Art. III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment," of which the District of Columbia was an instance (*id.* at 407–408).

In the instant case, similarly, Congress has concluded that in the case of crimes occurring on an Indian reservation but involving only non-Indians, its plenary power over Indian affairs should give way to accommodate the legitimate interest of the States in regulating the conduct of their citizens.

In the instant case, similarly, Congress' plenary power over Indian affairs includes the discretion to exercise the power in regard only to crimes on the

reservation that affect "essential tribal relations," leaving other crimes on the reservation to state regulation. Its decision that crimes entirely involving non-Indians, albeit occurring on the reservation, do not affect those essential relations is a reasonable one. Given the validity of that decision, the fact that federal and state sovereignties may define or punish substantially the same act (*e.g.*, murder) differently in some details is of no constitutional significance.[14]

4. Nothing in the cases relied upon by the court below requires a comparison of law within federal jurisdiction to law within state jurisdiction. In *Keeble* v. *United States,* 412 U.S. 205, the Court was con-

[14] Because respondents' equal protection claim rests upon the identity of the victim (if the victim had been Indian, any perpetrator would be tried under federal law) this Court's decision in *United States* v. *Feola*, 420 U.S. 671, is instructive. There the Court held that a conviction for assaulting a federal officer did not require proof of the defendant's knowledge of the official identity of his victim, adding that its decision "poses no risk of unfairness to defendants. It is no snare for the unsuspecting," since the perpetrator of such a crime "knows from the outset that his planned course of conduct is wrongful." (*Id.* at 685). The Court continued (*ibid*):

"The situation is not one where legitimate conduct becomes unlawful solely because of the identity of the individual or agency affected. In a case of this kind the offender takes his victim as he finds him. The concept of criminal intent does not extend so far as to require that the actor understand not only the nature of his act but also its consequence for the choice of judicial forum."

Here, as in *Feola*, respondents' case is not one in which "legitimate conduct becomes unlawful solely because of the identity of the individual * * * affected," and, also as in *Feola*, there is no real injustice in treating respondents the same way others would be treated who committed the same acts within federal jurisdiction rather than comparing their situation to a hypothetical non-Indian tried under exclusive state jurisdiction.

cerned with statutory interpretation, specifically, whether the Major Crimes Act (18 U.S.C. 1153) permits federal rather than tribal jurisdiction over lesser included offenses once the federal court has assumed jurisdiction over a major offense listed in the Act. In considering this question, the Court pointed to the government's concession that a non-Indian committing the same offense (assault with intent to commit serious bodily injury) and tried under 18 U.S.C. 1152 would have been entitled to the instruction (412 U.S. at 208–209). But the comparison was of crimes both of which would have been tried in federal courts under federal Indian country jurisdiction, since the victim was an Indian. The focus in *Keeble* thus was on the situation in which, because of a narrow statutory interpretation, the rights afforded a defendant in a federal prosecution would vary depending upon the status of the defendant. There was no comparison with results under state jurisdiction, and there is nothing in *Keeble* which suggests that, so long as federal jurisdiction is exercised in an internally non-discriminatory manner, the Constitution invalidates federal laws that differ from (or are stricter than) state laws applicable in cases outside federal jurisdiction.

For much the same reasons, the Ninth Circuit's prior decision in *United States* v. *Cleveland,* 503 F.2d 1067, relied upon by the court below (Pet. App. 9a–11a), does not support the court's result here. In *Cleveland,* the court held that an amendment to 18 U.S.C. 1153 providing that aggravated assaults by Indians should be defined and punished in accordance

with state law was unconstitutional as applied in that case, because it subjected the Indian defendant to more severe penalties than a non-Indian committing the same offense would receive in a trial in federal court under the reference of 18 U.S.C. 1152 to federal enclave law. See also *United States* v. *Big Crow,* 523 F.2d 955 (C.A. 8), certiorari denied, No. 75–5786, February 23, 1976; but see *United States* v. *Analla,* 490 F.2d 1204 (C.A. 10), vacated, 419 U.S. 813. The court was concerned with a disparity between the treatment of Indian and non-Indian defendants *both within federal Indian country jurisdiction* as delimited in *McBratney.* Indeed, the court rejected due process claims based on a comparison with a crime entirely between non-Indians, finding no difference in the applicable law but also citing *McBratney* and its successors as establishing that "Congress could not have asserted federal jurisdiction to define the crime or to prescribe the punishment for non-Indian assaults on non-Indians." 503 F.2d at 1070–1071. Whether or not *Cleveland's* conclusion as to Congressional power is sound, the decision is no authority for the proposition that the federal jurisdiction exercised in 18 U.S.C. 1152 and 1153, when internally uniform, must also be conformed to state law. [15]

In sum, the potential disparity in the treatment of respondents and a hypothetical non-Indian who kills another non-Indian on an Indian reservation derives

[15] The government has sponsored a bill, S. 2129, 94th Cong. 1st Sess. (1975), which provides identical definitions for crimes punished by 18 U.S.C. 1153 and 18 U.S.C. 1152 and which would thus correct the *Cleveland* problem. The bill was passed on May 21, 1976, and is awaiting presidential signature.

from a jurisdictional allocation which this Court has consistently acknowledged to be reasonable. Thus, whether or not Idaho requires proof of an additional element for a conviction of murder in the first degree, respondents' murder convictions under federal enclave law were valid.

B. FEDERAL LEGISLATION CONCERNING INDIANS DOES NOT REST UPON AN IMPERMISSIBLE RACIAL CLASSIFICATION

Despite its apparent recognition of the validity of the jurisdictional allocation established by the relevant statutes, the court of appeals nevertheless reversed the convictions here because it found that "the *sole* basis for the disparate treatment of [respondents] and non-Indians is that of race" (Pet. App. 6a; emphasis in original) and concluded that this "racially-based disadvantage" could not be justified by the government's wardship over the Indians (Pet. App. 12a–14a). As we have pointed out, respondents were tried under the same murder statute applicable, regardless of the race of the defendant, to any murder within federal jurisdiction. Moreover the court of appeals' argument rests upon a misconception of the nature of the federal government's relationship to the tribal Indians. It fails to recognize that "in dealing with Indians the Federal Government is dealing primarily not with a particular race as such but with members of certain social-political groups toward which the Federal Government has assumed special responsibilities" (Cohen, *Handbook of Federal Indian Laws* 5 (1940 ed.)).

1. The regulation of Indian affairs by the federal government, as this Court has repeatedly noted, grows

out of the former independence of the Indian tribes and their conquest by the United States, which then assumed a trust responsibility for them. *Cherokee Nation* v. *Georgia,* 5 Pet. 1; *United States* v. *Kagama,* 118 U.S. 375; *Board of County Commissioners* v. *Seber,* 318 U.S. 705; *Morton* v. *Mancari,* 417 U.S. 535; *United States* v. *Mazurie,* 419 U.S. 544.

In view of the special relationship between the federal government and tribal Indians, this Court has previously upheld federal Indian legislation against claims that it discriminated either for or against Indians. In *Morton* v. *Mancari,* for example, the Court upheld a Bureau of Indian Affairs hiring preference in favor of Indians, concluding that the preference was an employment criterion "reasonably designed to further the cause of Indian self-government" (417 U.S. at 554); it also observed that the practice was "not even a 'racial' preference" but was directed by its terms to members of "federally recognized" tribes and thus was "political rather than racial in nature" (*id.* at 553 n. 24).

In *Fisher* v. *The District Court,* No. 75–5366, decided March 1, 1976, the Court considered an equal protection claim in a jurisdictional context not unlike the instant one. The issue was whether a federally approved tribal ordinance conferring on tribal courts exclusive jurisdiction over adoptions among tribal members impermissibly denied an Indian plaintiff access to the state courts. In rejecting the claim that it did, the Court explained (slip op. 8):

> The exclusive jurisdiction of the tribal court does not derive from the race of the plaintiff

> but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law. Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government. *Morton* v. *Mancari,* 417 U.S. 535, 551–555 (1974).

Similarly, 18 U.S.C. 1151, 1152, and 1153, which define "Indian country" and, as interpreted by this Court, partition jurisdiction over crimes within Indian country between the federal government, the tribes, and the States are essentially not racial statutes. Indian country is defined in terms of reservations, trust allotments, and dependent Indian communities (18 U.S.C. 1151)—terms not concerned with race as such but with the government's trust responsibility for the groups in question. Moreover, providing for federal and tribal jurisdiction where Indian interests are at issue is an important exercise of the federal trust responsibility for Indian tribes. See *United States* v. *Kagama,* 118 U.S. 375, in which the Court upheld the Major Crimes Act (18 U.S.C. 1153) against claims that punishment of Indians on Indian lands for criminal offenses was exclusively a state function.

The characterization by the court of appeals in this case of the historic allocation of state-federal jurisdiction as racial discrimination is also unfounded in that here, as in *Mancari, supra,* persons racially Indian do not necessarily come within the purview

of the statutes. For instance, a pure-blooded Indian who has severed his relationship with his tribe is not an Indian for purposes of federal Indian country jurisdiction. See, *e.g., United States ex rel. Standing Bear* v. *Crook,* 25 Fed. Cas. 695, No. 14891; *In re Carmen's Petition,* 165 F. Supp. 942, 944 (N.D. Cal.), affirmed, 270 F.2d 809 (C.A. 9), certiorari denied, 361 U.S. 934. Nor are members of Canadian or South American Indian tribes or of North American tribes terminated by Act of Congress Indians for purposes of federal criminal jurisdiction, although they are racially Indian. See *Morton* v. *Mancari, supra,* 417 U.S. at 553, n. 24; *United States* v. *Mazurie, supra,* 419 U.S. at 554, n. 11; *United States* v. *Heath,* 509 F.2d 16 (C.A. 9). With respect to those persons, as with the hypothetical non-Indian who provided the basis for comparison in the court below, federal Indian jurisdiction does not apply for reasons independent of race, *i.e.,* because there is no federal trust responsibility and thus no federal interest to be protected.[16]

C. THE PRINCIPLE ADOPTED BY THE COURT OF APPEALS, IF UPHELD, THREATENS TO INJECT UNCERTAINTY AND CONFUSION INTO THE PROSECUTION OF CRIMES OCCURRING IN INDIAN COUNTRY

In ruling that the prosecution of Indians for felony murder of a non-Indian is an unconstitutional racial

[16] The non-discriminatory reach of 18 U.S.C. 1152 and 1153 is also demonstrated by the concern the statutes give to the identity of the victim as well as the accused. The statutory scheme, as noted, applies to crimes by both Indians and non-Indians, provided at least that the victim is Indian. In recognizing no difference between Indian and non-Indian defendants where an Indian victim is involved, the scheme manifests its nondiscriminatory purpose to protect the welfare of the Indian tribe.

discrimination because the federal law governing the prosecution is harsher than the state law that would apply to the same offense were the state courts to have jurisdiction, the court of appeals has, we submit, erected grave barriers to the effective enforcement of laws governing criminal offenses committed in Indian country, whenever the victim of a crime is a non-Indian.[17] These consequences of the court of appeals' decision highlight the rationality of the historic allocation of state-federal jurisdiction that the court held to violate equal protection principles in this case.

1. In reversing respondents' murder convictions, the court of appeals did not address itself to the problem of what, if anything, was required or could be done to eliminate impermissible "discrimination" when trying offenses with non-Indian victims as to which there are, as in this case, material differences between state and federal law. We can imagine two possible outcomes: that such offenses may not be prosecuted at all until Congress either conforms federal law to state law or extends federal jurisdiction to all crimes in Indian country; or that the prosecution may proceed, but state law must be applied whenever or to the extent that it is more "lenient" than federal law. Since it seems to us virtually unthinkable that discrepancies between state and federal law should render the laws wholly unenforceable with respect to significant categories of serious crimes, we proceed on the assumption that the court's decision would require the incorpora-

[17] Any such consequence has serious ramifications because, as indicated above (see n. 10, *supra*, and accompanying text), a substantial proportion of the residents of many Indian reservations are non-Indians.

tion of the more lenient aspects of state law. While not wholly precluding enforcement of the laws, the requirement that the most lenient features of state and federal law be pieced together in cases of this sort introduces serious elements of uncertainty into law enforcement in Indian country.[18]

2. Prior to the decision of the court of appeals, any homicide, robbery, arson, larceny, or carnal knowledge of a juvenile in which an Indian was involved as accused or victim and which was committed in Indian country was defined and punished under clearly understood federal statutes—*i.e.*, general federal enclave laws applicable to all persons, regardless or race or status, within areas of exclusive federal jurisdiction. This has provided reasonable certainty in the law applicable to these major offenses.

The court of appeals has now required district judges in homicide cases in Indian country (and presumably in cases involving other offenses as well) to compare federal law to the state law in effect at the time and, if the state law is more lenient in any material respect, either to dismiss the prosecution (though the

[18] While we believe that circumstances may in particular instances justify a Congressional decision to treat Indians differently from non-Indians, we cannot accept the notion, implied at some points in the court of appeals' opinion, that any Congressional power to discriminate is limited to treating Indian defendants more leniently than their non-Indian counterparts. The concept of leniency cannot be equated with "the interest of the Indians." Law-abiding reservation Indians, like other law abiding citizens, have an interest in effective law enforcement as well as leniency. The complicated comparison in search of leniency seemingly required by the court of appeals is not, in our view, in the interest of the Indian tribes or their individual members.

crime cannot be prosecuted under state law) or apply a composite rule assuring the Indian defendant the benefits of the most lenient aspect of each body of law.[19] This comparative process leads into a morass, ending certainty as to the applicable law.

The instant problem, for example, arises because Idaho amended its first degree murder statute to remove the felony murder doctrine but to provide a mandatory death sentence. According to the reasoning of the court of appeals, the district court, rather than applying 18 U.S.C. 1111 as directed by 18 U.S.C. 1153, should have afforded the Indian defendant the benefit of the fact that Idaho law does not authorize a felony murder conviction. On the other hand, the district court presumably must reject other portions of the Idaho statute, specifically the mandatory death sentence. But this means that the district court is required to apply a patchwork of state-federal legal principles reflecting no coherent system—neither the laws enacted by Congress nor the framework selected by the state legislature.

Furthermore, the logic of the court of appeals' decision applies not only to the substantive definitions of the offense and the potential punishment upon conviction, but also to myriad procedural matters of potentially critical importance to the outcome of a trial. Differences in liberality of discovery, burden of proof on affirmative defenses, formulation of jury instructions, and similar matters between federal and state

[19] Several other crimes, either under the Assimilative Crimes Act, 18 U.S.C. 13, or under the second and third paragraphs of 18 U.S.C. 1153, are referred to state law for either definition or punishment. But see note 15, *supra*.

systems may give rise to "racial discriminations" equally deserving of the criticism leveled here against the application of federal felony murder principles. For example, if a State imposed upon the defendant the burden of establishing an insanity defense (*e.g., Leland* v. *Oregon,* 343 U.S. 790) but utilized a far more liberal version of the defense than is recognized in federal law, Indians seeking to raise such a defense in a federal prosecution would presumably have to be afforded the liberal state definition of insanity, while the burden of proof would remain on the prosecution under applicable federal principles.

The opportunities for confusion and dispute created by the court of appeals' decision thus appear virtually limitless. Moreover, it will often be impossible for a judge to determine whether the state or the federal statute is more "lenient". For instance, the federal manslaughter statute, 18 U.S.C. 1112, provides only two categories of manslaughter, voluntary and involuntary, and provides imprisonment of not more than ten years for the former and not more than three years and a fine of $1,000 for the latter. The Idaho statutes (§§ 18–4006, 18–4007 (1975 Cum. Supp.)) provide four categories of manslaughter and penalties varying by category, some greater, some less than under the federal statute. An attempt to collate these statutes leads to nothing but confusion.

While many other like examples could be adduced, we think it plain from the foregoing that the superimposition of the court of appeals' equal protection analysis upon the historic state-federal division of jurisdiction over offenses committed in Indian country has, to say the least, unfortunate consequences for

rational law enforcement in the area. Of course, if the court of appeals' analysis is correct, the unconstitutional consequences of the historic system cannot be countenanced, regardless of adverse practical impact. As a practical matter, Congress would be forced to make an almost impossible choice. It could assert exclusive federal jurisdiction over all offenses occurring in Indian country, thereby increasing federal responsibility beyond the needs of its trusteeship. Alternatively, it could provide that all such offenses be governed by state law under an assimilative crimes principle (at least as to crimes with non-Indian victims) thereby renouncing its discretion in exercising its trusteeship, and, in effect, relinquishing the supremacy of federal law in a field of federal responsibility. The rationality and constitutional validity of the historic system of allocation of jurisdiction is, we suggest, illuminated by the unfortunate consequences of the court of appeals' result.

3. Additionally, we observe that the decision below, although cast in terms of assuring that Indian defendants are not subjected to any features of federal law that are more "harsh" than applicable state law, also has consequences for state trials of non-Indians charged with offenses in Indian country, which come within the historically recognized jurisdiction of the state courts. If the court of appeals is correct in holding that respondents' conviction of felony murder constitutes impermissible racial discrimination between Indians and non-Indians, we have considerable difficulty avoiding the conclusion that non-Indians subjected to provisions of Idaho law that are harsher

than corresponding federal provisions for offenses on the Coeur D'Alene reservation would also be victims of racial discrimination. For example, the murder of a peace officer acting in the line of duty could not constitutionally be tried as first degree murder in the Idaho courts without proof of premeditation, as Idaho Code § 18–4001 provides, because the federal provision that would govern the trial of an Indian for the same offense, 18 U.S.C. 1111, contains no similar provision. In other words, whenever the special federal wardship interests respecting tribal Indians are insufficient to justify a result that treats Indians less favorably than non-Indians, it is hard rationally to justify treating non-Indians less favorably than similarly circumstanced Indians. Thus, if the court of appeals is correct here, it seems likely that the Equal Protection Clause of the Fourteenth Amendment correspondingly obliges state courts to import any more lenient features of federal law into trials of non-Indians for offenses committed in Indian country.

II.

IF THIS COURT ACCEPTS THE RATIONALE OF THE COURT OF APPEALS, IT SHOULD CONSTRUE 18 U.S.C. 1152 (AS IT LITERALLY READS) TO ENCOMPASS ALL OFFENSES COMMITTED IN INDIAN COUNTRY

1. On its face, the first paragraph of 18 U.S.C. 1152 requires the application of general federal enclave law to all offenses committed in Indian country, regardless of the identity of the accused (the second paragraph reserves tribal jurisdiction over offenses committed by Indians but creates no exception for non-Indian defendants). As we have seen, this Court,

sensitive to the respective areas of interest of the States and of the United States, has construed the predecessors of Section 1152 as not providing federal jurisdiction over crimes solely involving non-Indians although occurring within Indian reservations.

It is a well recognized principle of statutory construction that the Court should adopt that interpretation of a challenged statute that will preserve its constitutionality, wherever the language and history of the statute admit of such an interpretation. See *Screws* v. *United States,* 325 U.S. 91, 98; *Labor Board* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 30; *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 348 (Brandeis, J., concurring). Accordingly, if this Court agrees with the court of appeals that the division of jurisdiction heretofore approved by decisions of this Court leads to unconstitutional results nullifying various provisions of Section 1153 when the latter conflict with state law, it becomes necessary to reconsider the interpretation of Section 1152's predecessors adopted in *McBratney* and *Draper.* The equal protection problems can be obviated by construing Section 1152 to vest exclusive jurisdiction in the federal courts over all offenses occurring in Indian country, regardless of the identity of accused or victim, thereby causing all cases to be governed by federal law.[29]

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[29] In view of the fact that Section 1152 is, on its face, concerned with directing that federal law governs the prosecutions within its reach rather than with the question of which courts have jurisdiction to try the cases, it might be possible to construe the provision as leaving jurisdiction in state courts but requiring them to apply federal substantive law. From a prac-

Were the Court to adopt this construction and, in effect, overrule *McBratney, Draper,* and their progeny, it would follow that respondents' equal protection attack on the statute must fail, since the hypothetical non-Indian defendant could not avoid exposure to a felony murder conviction through recourse to more "lenient" state law.

We do not mean by the foregoing to suggest that, as a legislative matter, recognition of exclusive federal jurisdiction over crimes in Indian country, regardless of Indian involvement in the particular transaction, is a wise course. Such a course would entail a considerable expansion of federal jurisdiction with respect to a class of cases in which it might reasonably be concluded that federal regulatory interests are subordinate to those of the States. Moreover, in view of the large non-Indian population in many reservations, it might substantially expand the workload of the federal district courts in some of the western States. On the other hand, such a course could well be judged preferable to the uncertanties caused by the impact of the

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tical standpoint, this seems a quite unsatisfactory approach. Moreover, it is probably inconsistent with 18 U.S.C. 3231, which vests exclusive jurisdiction in the federal district courts to try "all offenses against the laws of the United States," since the reinterpretation of Section 1152 discussed in text would appear necessarily to transform criminal acts by non-Indians in Indian country that have previously been tried by the States into offenses against the United States.

The August 15, 1975 Committee Print of S. 1, 94th Congress, 1st Session, the proposed Federal Criminal Code would extend concurrent Federal criminal jurisdiction to crimes between non-Indians within Indian country. See Sections 203; 205; 685(c). If the court of appeal's reasoning is accepted, it seems doubtful that this would eliminate the equal protection problem.

decision of the court of appeals upon the present jurisdictional allocation (see pp. 36–42, *supra*); and it would have the virtue of fostering the intent of Congress to have the crime of murder (and other major crimes) occurring on Indian reservations tried in accordance with uniform and well understood federal law.

CONCLUSION

It is therefore respectfully submitted that the judgment of the court of appeals should be reversed.

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